UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
NOV 15 2007
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

EXCEPTIONAL INNOVATIONS, LLC,

Plaintiff,

vs.

Case No. 2:07CV-724
District Judge Sargus
Magistrate Judge Abel

KONTRON AMERICA, INC.,

Defendant.

'07 CV 2199 L (NLS)

OPINION AND ORDER

Plaintiff Exceptional Innovations, Inc. (Plaintiff or Exceptional) originally filed this action on July 7, 2007, in the Court of Common Pleas of Delaware County, Ohio, (Case No. 07-CVH-06-0765) against Defendant Kontron America, Inc. (Defendant or Kontron) seeking declaratory judgment that Kontron had "materially breached" a certain contract with Exceptional for the purchase of goods and that, consequently, Exceptional was "excused from any further performance or liability to Kontron" thereunder. Doc. 2-2, p. 7. The Complaint also sought attorney fees and costs. Ibid. Copies of Exceptional's two Purchase Requests dated May 12, 2005, allegedly accepted by Kontron to create the contracts in question, were attached to the Complaint. Id. at 4.

On July 27, 2007, Defendant Kontron filed Notice of Removal of the case to this court pursuant to the provisions of 29 U.S.C. §§ 1441, 1446, and 1332(a)(1), asserting that Plaintiff is an "Ohio limited liability company with its principle place of business in Westerville, Ohio" while Defendant is a "Delaware corporation with its principle place of business in Poway, California" and that the amount in controversy exceeds $75,000. Doc. 2, pp. 1-2. Within a week, "[p]ursuant to 28 U.S.C. § 1404(a) and Rule 12(b)(3) of the Federal Rules of Civil Procedure" Defendant then filed a Motion To Transfer Venue to the United States District Court for the Southern District of California, based primarily on an alleged "forum selection clause" in the contract in question. Doc. 6, p. 1.[1] The case is now before the Court for consideration of that motion to transfer together with the supporting and opposing memoranda and related materials filed by the parties. Docs. 11, 14.

The Court first notes that Rule 12(b)(3) authorizes raising the defense of "improper venue" by motion, but that Defendant nowhere suggests this Court lacks jurisdiction or that the case should be dismissed. Further, as the party who procured its removal, Defendant could scarcely argue that it should now be remanded. In any event, the alleged "forum selection clause" in this case does not approach the specificity required to waive either parties' otherwise-available right to remove the case here. See Regis Associates v. Rank Hotels (Management) Ltd., 894 F.2d 193, 195 (6th Cir. 1990) ("Although the right to remove can be waived, the case law makes it clear that such waiver must be clear and unequivocal.") Further, based on the allegations of the Complaint and clearly applicable Supreme Court and Sixth Circuit authority discussed below, it appears that only the Court's discretionary §1404(a) authority to transfer the case to another district where it might have been brought is involved here, and not Rule 12(b)(3).

1. On the same day, August 3rd, Defendant also filed its Answer and Counterclaim to Plaintiff's Complaint. Doc. 7.

The "forum selection clause" upon which Kontron relies in arguing for the transfer it seeks appears as paragraph 19 of its general Terms and Conditions of Sales, allegedly incorporated in its Sales Quotes to Exceptional that became the sales agreements in question in this case. Affidavit of Anthony T. Hallett, Doc. 6-2, p. 3. That paragraph provides as follows:

> 19. **Governing Law and Venue**. This agreement shall be construed and enforced according to the laws of the State of California regarding contracts made and wholly performed in California. Kontron and BUYER irrevocably submit to the jurisdiction of the state and/or federal courts in San Diego County, California for any action or proceeding regarding this Agreement.

Doc. 6-2, (attmt, p. 11). For purposes of deciding the present motion to transfer, Exceptional does not dispute the applicability of this provision to the sales agreements in question. Doc. 11, p. 1, n.1.

In support of its motion, Kontron relies primarily on law set out in, or following, two seminal opinions. In Stewart Organization, Inc. v. Ricoh Corporation, 487 U.S. 22 (1988), the Supreme Court states at 29-30:

> Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an "individualized, case-by-case consideration of convenience and fairness." *Van Dusen v. Barrack*, 376 U.S. 612, 622, 84 S.Ct. 805, 812, 11 L.Ed.2d 945 (1964). A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors. The presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus. In its resolution of the § 1404(a) motion in this case, for example, the District Court will be called on to address such issues as the convenience of a Manhattan forum given the parties' expressed preference for that venue, and the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power. The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences.

In Kerobo v. Southeastern Clean Fuels, Corp., 285 F.3d 531 (6th Cir. 2002), the case was much like this one in that it involved a very similar forum-selection clause[2] and a complaint for, among others, breach of contract, filed in a state court other than the one selected in that clause, which case had then been removed on diversity grounds to federal court, and a motion filed for dismissal under Rule 12(b)(3) or for transfer pursuant to §1404(a). Noting that the case was "in all material respects indistinguishable from *Ricoh*" (285 F.3d 533), the circuit court reversed the lower court's dismissal under Rule 12(b)(3) and remanded for a determination, consistent with Ricoh and its own opinion, of the "appropriate effect under federal law of the parties' forum-selection clause on the defendants' 28 U.S.C. §1404(a) motion." Id. at 539.

Plaintiff Exceptional's argument in opposition to the transfer is based primarily on its assertion that:

> The relevant clause [of the parties' agreement] is merely a permissive forum selection clause and is not a substantial factor in the analysis of whether to transfer the case. The fact that a California court might *also* be *an* appropriate venue is irrelevant because Kontron's sole objection to *this* venue fails.

Doc. 11, p. 1 (emphasis in the original). Plaintiff also argues that: "Kontron points to only one factor in support of its request for transfer, the permissive forum selection clause." Id. at 5. The Court finds neither argument is entirely accurate or

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2. The licensing agreement in Kerobo provided: "This agreement shall be interpreted, construed, and governed by the laws of the State of California. Jurisdiction for any action for breach, damages or default shall be within the County of Orange, State of California." 285 F.3d 532-33.

sufficiently supported by the individualized, case-specific factors present to persuade the Court's exercise of discretion in this case.

Plaintiff's argument that the "relevant clause . . . is merely a permissive forum selection clause" is not fully supported by the facts. The meaning of what Plaintiff terms the "relevant clause" is necessarily affected by the context in which it appears, and that contract paragraph is entitled, in bold and underlined: "**Governing Law and Venue**," and the first of its two sentences is an unequivocal choice of the "laws of the State of California regarding contracts made and wholly performed in California" as the law to be applied in construing and enforcing the agreement.[3] Thus, the pertinent paragraph is, first and foremost, a choice-of-law provision, and as Defendant points out (Doc. 6, p. 11; Doc. 13, p. 2), the California Code of Civil Procedure (as might be expected) apparently makes provision for such proceedings as these only in the courts of California. See Cal. Code of Civ. Pro. §§ 395 and 395.5.[4] In this context, then, the irrevocable submission of the parties to "the jurisdiction of the state and/or federal courts in San Diego County, California" found in the second sentence's so-called "relevant clause" amounts to a choice of

3. In view of this provision, it appears that even if the proceeding were to remain in Ohio, this or any other court with jurisdiction would still be called upon to decide the case in accordance with the law of the State of California. See Jarvis v. Ashland Oil, Inc., 17 Ohio St.3d 189 (1985); Tele-Save Merchandising Co. v. Consumers Distributing Co., Ltd., 814 F.2d 1120 (6th Cir. 1987)

4. Section 395.5 provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

particular forums within the State of California, the law of which has already been chosen to resolve disputes arising out of the agreement in question.

It has not been suggested that this contractual provision constitutes a waiver of Plaintiff's right under Ohio's Long-Arm Statute (Ohio Revised Code §2307.382) to initiate this proceeding in the Delaware County, Ohio, Court of Common Pleas; and, as noted above, the provision is also not sufficient to waive Defendant's right under federal law to remove the proceeding to this Court. But, neither of those jurisdictional circumstances determines resolution of the different and more limited venue question now presented by Defendant's motion to transfer the proceeding to another district in which it might also have been brought. As the parties' arguments suggest, answering that question requires the Court to consider whether, and if so how much, the contractual provisions present in the parties' agreement should influence the Court's discretionary ruling on the motion.

In the circumstances of this case, however, the the Court does not consider it necessary (as the parties' arguments also suggest) to resolve the question whether, as part of a purely California contract to be interpreted under California law, that provision is an exclusive, or merely a permissive, choice of a California forum.[5] As part of a commercial contract between business entities, in the absence of fraud or overreaching or a showing that enforcement would be unreasonable or unjust

5. The Court does not agree with Plaintiff's argument or its lower court authority suggesting that such a determination is required in order to properly decide, much less necessarily controls, the Court's exercise of discretion in deciding whether a transfer should be ordered under authority of §1404(a) in the particular circumstances of this case.

(and none of those is suggested to be present here), the clause is valid. See Preferred Capital, Inc. v. Associates in Urology, 453 F.3d 718, 721 (6th Cir. 2006). The parties appear of roughly equivalent bargaining power, and it cannot be argued successfully that Plaintiff would effectively be denied its day in Court by transfer of the case to a federal district court in California. Whether exclusive or permissive, the clause therefore remains a significant statement of forum agreement, included by the parties in the contract in question. As such, it should be given appropriate consideration along with other "case-specific factors" as called for by the Ricoh and Karobo opinions, in reaching the Court's decision whether to order a §1404(a) transfer of this case.

Such other case-specific factors the Court is called upon to consider include convenience of parties and witnesses, public-interest factors of systemic integrity, and private concerns falling under the heading interest of justice. Kerobo, at 537 (quoting Ricoh at 30). As shown by the Complaint and the memoranda and supporting affidavits filed in connection with the present motion, this case involves alleged breech of the contract that arose from Ohio Plaintiff Exceptional's order for Defendant Kontron of San Diego County, California, to produce certain computer modules to be shipped to Exceptional in Westerville, Ohio, for integration into home entertainment and automation systems it designs and sells. Thus, in this contracts case, with a manufacturer/buyer (and its witnesses and relevant records) located in Ohio and a manufacturer/seller (and its witnesses and relevant records) located in

California, on the basis of what is before the Court on this motion to transfer proceedings from Ohio to California, with but one exception, none of the above, other case-specific factors indicates a particular ruling here.

The significant exception in the circumstances of this case (whether or not characterized as public interest in systemic integrity) is the clear choice-of-law provision in the parties' contract. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947), the Supreme Court, ruling as to an earlier, more restrictive standard for change of venue, never-the-less observed:

> . . . . There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

The potential significance of this factor in ruling on requests for transfer has been recognized by other district court decisions in our circuit

> Another relevant factor is the district court's familiarity with the applicable law. Here, it is undisputed that the option agreement is to be 'interpreted and enforced under the laws of the State of Ohio' (Exhibit B, p. 8, doc. 10), and it cannot be denied that there is an advantage in having a district court apply the law of the state in which it sits. See *Vector Company, Inc., [v. Urban Systems Development Corp., 360 F.Supp. 864, 865 (E.D. Tenn. 1972)]*

Artisan Devel. Div. of Kaiser Aetna v. Mountain States Devel. Corp., 402 F.Supp. 1312, 1316 (S.D. Ohio 1975). The Court finds that the presence here of this case-specific factor is sufficient to outweigh Plaintiffs initial choice of forum and to persuade the Court that the discretionary §1404(a) transfer sought by Defendant should be granted.

Consistent with the foregoing, it is therefore ORDERED that Defendant's Motion To Transfer Venue (Doc. 6) is GRANTED and that this proceeding is hereby TRANSFERRED to the United States District Court for the Southern District of California at San Diego.

The Clerk of this Court is authorized and directed to take all administrative step necessary to carry out this Order.

IT IS SO ORDERED.

10-11-2007
Dated

Edmund A. Sargus, Jr.
United States District Judge

I CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL FILED IN MY OFFICE ON 10-11-07
JAMES BONINI, CLERK
BY: _______ Deputy Clerk
DATE: 11-7-07

CLOSED, JURY

U.S. District Court
Southern District of Ohio (Columbus)
CIVIL DOCKET FOR CASE #: 2:07-cv-00724-EAS-MRA

Exceptional Innovation, LLC v. Kontron America, Inc.
Assigned to: Edmund A Sargus
Referred to: Mark R. Abel
Case in other court: Court of Common Pleas Delaware County, Ohio, 07-CVH-06-00765
Cause: 28:1441 Petition for Removal

Date Filed: 07/27/2007
Date Terminated: 10/11/2007
Jury Demand: Both
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff

Exceptional Innovation, LLC represented by

Nelson Marlin Reid
Bricker & Eckler - 2
100 S Third Street
Columbus, OH 43215-4291
614-227-2300
Fax: 614-226-8812
Email: nreid@bricker.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Philomena M Dane
Squire Sanders & Dempsey
41 S High Street
Suite 1300
Columbus, OH 43215
614-365-2840
Fax: (614) 365-2499
Email: pdane@ssd.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sommer Lynn Sheely
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
614-227-8870
Fax: 614-227-2390
Email: ssheely@bricker.com
ATTORNEY TO BE NOTICED

V.

Defendant

Kontron America, Inc.

represented by **Philomena M Dane**
Squire Sanders & Dempsey
1300 Huntington Center
41 S High Street
Suite 1300
Columbus, OH 43215
614-365-2840
Fax: (614) 365-2499
Email: pdane@ssd.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jessica Diane Goldman
Squire Sanders & Dempsey
41 South High Street
Suite 1300
Columbus, OH 43215
614-365-2717
Fax: 614-365-2499
Email: jgoldman@ssd.com
ATTORNEY TO BE NOTICED

Counter Claimant

Kontron America, Inc.

represented by **Philomena M Dane**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jessica Diane Goldman
(See above for address)
ATTORNEY TO BE NOTICED

V.

Counter Defendant

Exceptional Innovation, LLC

represented by **Nelson Marlin Reid**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sommer Lynn Sheely
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/27/2007	1	Civil and Supplemental Cover Sheet (sr) (Entered: 07/30/2007)
07/27/2007	2	NOTICE OF REMOVAL filed by Defendant Kontron America, Inc. from Court of Common Pleas Delaware County, Ohio, case number 07-CVH-06-0765. (Filing fee $ 350) (Attachments: # 1 Exhibit State Complaint) (sr) (Entered: 07/30/2007)
07/27/2007	3	COMPLAINT filed in Court of Common Pleas Delaware County, Ohio by Plaintiff Exceptional Innovation, LLC against Defendant Kontron America, Inc. (sr) (Entered: 07/30/2007)
07/27/2007	4	Corporate Disclosure Statement filed by Kontron America, Inc. (sr) (Entered: 07/30/2007)
07/27/2007		Notice of Removal Filing fee: $ 350, receipt number 257318 (sr) (Entered: 07/30/2007)
07/30/2007	5	NOTICE OF DOCKETING in a Removal. (sr) (Entered: 07/30/2007)
08/03/2007	6	MOTION to Change Venue by Defendant Kontron America, Inc.. (Attachments: # 1 Affidavit) (Goldman, Jessica) (Entered: 08/03/2007)
08/03/2007	7	ANSWER to Complaint with Jury Demand, COUNTERCLAIM against Exceptional Innovation, LLC by Defendant Kontron America, Inc., Plaintiff Exceptional Innovation, LLC. (Attachments: # 1 Exhibit # 2 Exhibit # 3) (Goldman, Jessica) (Entered: 08/03/2007)
08/03/2007	8	Defendant Kontron America, Inc.'s Notice of Filing Notice of Removal. (sr) (Entered: 08/06/2007)
08/03/2007		Remark: State Court Record Received (07-CV-H-06-0765). (sr) (Entered: 08/06/2007)
08/15/2007	9	NOTICE of Hearing: Preliminary Pretrial Conference set for 10/4/2007 @ 9:30 AM before Mark R. Abel. Conf of the parties due by 9/6/07; Rule 26f report due by 9/27/07. (sh1,) (Entered: 08/15/2007)
08/23/2007	10	ANSWER to Counterclaim by Counter Defendant Exceptional Innovation, LLC. (Reid, Nelson) (Entered: 08/23/2007)
08/24/2007	11	RESPONSE in Opposition re 6 MOTION to Change Venue filed by Plaintiff Exceptional Innovation, LLC. (Attachments: # 1 Exhibit 1) (Reid, Nelson) (Entered: 08/24/2007)
09/06/2007	12	Corporate Disclosure Statement by Exceptional Innovation, LLC. (Reid, Nelson) (Entered: 09/06/2007)
09/07/2007	13	RESPONSE in Support re 6 MOTION to Change Venue filed by Plaintiff Exceptional Innovation, LLC. (Dane, Philomena) (Entered: 09/07/2007)

09/07/2007	14	REPLY to Response to Motion re 6 MOTION to Change Venue filed by Defendant Kontron America, Inc. (kch) (Entered: 09/10/2007)
09/27/2007	15	RULE 26(f) REPORT by Plaintiff Exceptional Innovation, LLC, Defendant Kontron America, Inc.. (Reid, Nelson) (Entered: 09/27/2007)
10/04/2007		Minute Entry for proceedings held before Judge Mark R. Abel : Initial Pretrial Conference held on 10/4/2007. (mra2,) (Entered: 10/09/2007)
10/11/2007	16	OPINION AND ORDER granting 6 Defendant's Motion to Transfer Venue. This proceeding is transferred to the United States District Court for the Southern District of California at San Diego. Signed by Judge Edmund A Sargus on 10/11/07. (dh) (Entered: 10/11/2007)
10/29/2007		Southern District of California Case No.: 07CV2041-LAB-WMc. (pes) (Entered: 10/29/2007)
11/07/2007		Remark: State Court Record returned to Delaware County Court of Common Pleas via certified mail (7002 0510 0004 1261 6195). (er) (Entered: 11/07/2007)
11/13/2007		Remark: State Court Record Returned from Clerk of Courts Delaware, Ohio. State Court Record sent to the U.S. District Court Southern District of California, San Diego (7002 0510 0004 1262 3780). (sr) (Entered: 11/13/2007)

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11/16/2007 18:47:42

PACER Login:	ud0077	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	2:07-cv-00724-EAS-MRA
Billable Pages:	2	**Cost:**	0.16

FILED
JAMES BONINI
CLERK
2007 AUG -3 P 2:49
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

IN THE COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED
2007 JUL 30 AM 11:24
JAN ANTONOPLOS
CLERK

EXCEPTIONAL INNOVATION, LLC

Plaintiff,

v.

KONTRON AMERICA, INC.

Defendant.

Case No. 07-CV-H-06-0765

Judge W. Duncan Whitney

DEFENDANT KONTRON AMERICA, INC.'S NOTICE OF FILING NOTICE OF REMOVAL

Please take notice that the above-captioned case has been removed to the United States District Court for the Southern District of Ohio, Eastern Division. In accordance with the provisions of 28 U.S.C. § 1446, a copy of Defendant's Notice of Removal filed by Defendant Kontron America, Inc. with the Clerk of the United States District Court for the Southern District of Ohio, Eastern Division at Columbus, Ohio on July 27, 2007, is attached hereto.

Respectfully submitted,

Philomena M. Dane (0044064)
(Trial Attorney)
Jessica D. Goldman (0077049)
SQUIRE, SANDERS & DEMPSEY, LLP
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-2700
(614) 365-2499
pdane@ssd.com
jgoldman@ssd.com

Attorneys for Defendant

TERMINATION CODE 1/15

2:07-cv-724
EAS/MRA

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0765
00081500822
NOTC

CERTIFICATE OF SERVICE

I certify that, on July 30, 2007, I caused this Defendant Kontron America, Inc.'s Notice of Filing Notice of Removal to be served via regular U.S. mail, postage prepaid, to the following individuals:

Nelson M. Reid
Sommer L. Sheely
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215

Attorneys for Plaintiff

One of the Attorneys for Defendant

FILED JAMES BONINI CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION 07 JUL 27 PM 1:57

U.S. DISTRICT COURT SOUTHERN DIST. OHIO EAST. DIV. COLUMBUS

EXCEPTIONAL INNOVATION, LLC **480 Olde Worthington Road, Suite 350** **Westerville, Ohio 43082,** **Plaintiff,** **v.** **KONTRON AMERICA, INC.** **14118 Stowe Drive** **Poway, California 92064,** **Defendant.**	)	**Case No.** 2 : 07 CV 724 **Judge** JUDGE SARGUS **Magistrate Judge** MAGISTRATE JUDGE ABEL

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1441 and 1446, Defendant Kontron America, Inc. removes this action from the Court of Common Pleas, Delaware County, Ohio, Civil Division, to the United States District Court for the Southern District of Ohio, Eastern Division, and states as follows:

1. On June 27, 2007, Plaintiff filed a Complaint against Kontron America, Inc. in the Delaware Court of Common Pleas, Case No. 07-CV-H-06-0765. Defendant was served with a copy of the Summons and Complaint on June 29, 2007. A copy of the Complaint and all process, pleadings, and orders that have been served as of the time of this filing are attached to this Notice of Removal as Exhibit A in accordance with 28 U.S.C. § 1446(a).

2. This Court has original diversity jurisdiction over all claims set forth in the Complaint pursuant to 28 U.S.C. § 1332(a)(1). Plaintiff Exceptional Innovation is an Ohio limited liability company with its principal place of business in Westerville, Ohio. See Complaint, ¶ 1. Defendant Kontron America, Inc. is a Delaware corporation with its principal

place of business in Poway, California. See Complaint, ¶ 2. The amount in controversy exceeds $75,000. See Complaint, ¶ 37, 44

3. This Notice of Removal is timely as it is filed within thirty (30) days after receipt of a copy of the Complaint by Defendant in accordance with 28 U.S.C. § 1446(b).

4. Defendant will, promptly after the filing of this Notice of Removal, give written notice of this Notice of Removal to Plaintiff and will file a copy of this Notice of Removal with the Clerk of the Court of Common Pleas of Delaware County, Ohio.

5. This action is not one which is described in 28 U.S.C. § 1445.

6. By filing this Notice of Removal, Defendant does not waive its right to demand enforcement of the parties' forum selection clause, object to venue or otherwise assert any and all defenses available to it, all of which Defendant expressly reserves.

WHEREFORE, Defendant prays that this action be removed from the Court of Common Pleas, Delaware County, Ohio, Civil Division, to this Court pursuant to 28 U.S.C. § 1441(a).

Respectfully submitted,

Philomena M. Dane (0044064)
(Trial Attorney)
Jessica D. Goldman (0077049)
SQUIRE, SANDERS & DEMPSEY, LLP
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-2700
(614) 365-2499
pdane@ssd.com
jgoldman@ssd.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that, on July 27, 2007, I caused this Notice of Removal to be served via regular U.S. mail, postage prepaid, to the following individuals:

Nelson M. Reid
Sommer L. Sheely
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215

Attorneys for Plaintiff

One of the Attorneys for Defendant

Common Pleas Court
Delaware Co., Ohio
I hereby certify the within be a tru
copy of the original on file in this off
Jan Antonopolos, Clerk of Court
By ______ Deputy

IN THE COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO

EXCEPTIONAL INNOVATION, LLC 480 Olde Worthington Road, Suite 350 Westerville, Ohio 43082, Plaintiff, vs. KONTRON AMERICA, INC. 14118 Stowe Drive Poway, CA 92064 Defendant.	:	CASE NO. 07-CV-H.-06-0765 JUDGE W. DUNCAN WHITNEY JURY DEMAND ENDORSED HEREON

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED
2007 JUN 27 AM 9:47
JAN ANTONOPOLOS
CLERK

COMPLAINT FOR DECLARATORY JUDGMENT

Now comes Plaintiff Exceptional Innovation, LLC ("Exceptional Innovation"), by and through counsel, and for its Complaint against Defendant Kontron America, Inc. ("Kontron") states the following:

The Parties

1. Exceptional Innovation is now and was at all relevant times an Ohio limited liability company with its principal place of business in Westerville, Delaware County, Ohio.

2. Upon information and belief, Kontron is now and was at all relevant times a Delaware corporation with its principal place of business in Poway, San Diego County, California. Upon information and belief, Kontron maintains and maintained at relevant times to this action a place or places of business in the State of Ohio. Kontron does business throughout the United States and worldwide.

Jurisdiction and Venue

3. The Court has personal jurisdiction over Kontron, among other reasons, under

Ohio's Long-Arm Statute, specifically, Ohio Revised Code §§ 2307.382(A)(1), (2), and (5).

4. Venue is proper in this Court pursuant to, *inter alia*, Civil Rule 3(B)(3), and (6) and Civil Rule 3(E) as Kontron conducted activity in Delaware County, Ohio, that gave rise to a claim for relief, and all or part of Exceptional Innovation's claim for relief arose in Delaware County, Ohio.

Statement of Facts

5. This case concerns a contract dispute between Exceptional Innovation, a final product manufacturer, and Kontron, one of its component vendors.

6. Exceptional Innovation is, in part, in the business of designing and selling state-of-the-art digital home entertainment and automation systems. These systems offer user convenience and efficiency by integrating various home entertainment systems onto a single network. In the course of its business, Exceptional Innovation designs and sells both software and hardware.

7. Kontron is in the business of selling embedded standard and custom computer technology. Kontron's products are components intended for integration into other systems. The relevant Kontron product to this action is a particular type of embedded internal computer module, which Exceptional Innovation expected to use in certain new hardware devices.

8. At a trade show in or about September 2004, Exceptional Innovation's President and Chief Executive Officer, Seale Moorer, was approached by Matthias Huber, Kontron's representative, who offered basic information about the nature of Kontron's products.

9. After the trade show, Mr. Moorer asked Kyle Virgin, Hardware Design Engineer for Exceptional Innovation, to explore further whether Kontron's technology may be an appropriate solution for integration into Exceptional Innovation's emerging hardware products.

10. As a result, Mr. Virgin made some information requests on Kontron's website.

11. Kontron's internal salesman, Tony Hallett, responded to these requests by telephoning Mr. Virgin. In their conversation, Mr. Hallett provided some additional background on Kontron's products.

12. Mr. Virgin informed Kontron, among other things, of the nature of the solution he was seeking, the nature of Exceptional Innovation's product lines, and Exceptional Innovation's anticipated production timetable for the new hardware devices.

13. Shortly thereafter, Kontron instructed its local agent, Jerome Rozek, to contact Exceptional Innovation to work toward developing an appropriate solution.

14. Upon information and belief, during the entire time Exceptional Innovation dealt with Mr. Rozek, he maintained an office as Kontron's employee and agent in North Royalton, Ohio, and listed both his office and mobile telephone numbers as within the 440 area code (suburban Cleveland). Mr. Rozek's email address was at all relevant times jerome.rozek@us.kontron.com.

15. In late 2004 and early 2005, Exceptional Innovation viewed and tested various sample products sent by Kontron both in Ohio and during visits to Kontron in California. Mr. Rozek also met with Exceptional Innovation in its Delaware County facility on four or five separate occasions.

16. A series of products Kontron offered in late 2004 and early 2005 was not acceptable for Exceptional Innovation's needs.

17. Finally, in April 2005, Kontron presented Exceptional Innovation with a module Exceptional Innovation felt would meet its needs, both in terms of technology and timeframe. This module is known by the Kontron name ETX Express (hereinafter "the Modules").

18. Among the features that were key to Exceptional Innovation's decision to order the Modules was their One Gigabit Ethernet product, which was far more advanced than other products on the market at the time. Exceptional Innovation communicated to Kontron that using state-of-the-art technology was critical to the hardware products it was developing.

19. Kontron also promised it would have the Modules ready by June 2005, which fit Exceptional Innovation's planned production timeframe.

20. On or about May 12, 2005, Exceptional Innovation submitted two purchase requests to Kontron for approximately $1.5 million worth of several Kontron products, including approximately $912,000 worth of the Modules. (True and correct copies of the purchase requests are attached hereto as Exhibit A).

21. The purchase requests were accepted by Kontron, forming a binding contract for the goods ordered therein (the "Contract").

22. Consistent with Kontron's representations, the Contract indicated the "required date" for the Modules was June 15, 2005. The Contract also contains the following notation: "300 units requested ASAP. The rest to follow within the next 12 months based upon demand."

23. In fact, Kontron seriously misrepresented the date on which it could perform by delivering working Modules.

24. Beginning immediately after contracting, Kontron began to stall and to inform Exceptional Innovation of problems it was having in producing working Modules.

25. In the summer and fall of 2005, Kontron shipped only small quantities of Modules to Exceptional Innovation, which failed due to a variety of technical issues.

26. Exceptional Innovation promptly notified Kontron of these failures and returned the Modules to Kontron.

27. Exceptional Innovation also conducted extensive in-house testing on the Modules to aid Kontron in diagnosing problems with the Modules.

28. From the time of contracting until December – a period of six months – Mr. Virgin and others at Exceptional Innovation devoted substantial time on a daily basis to working with Kontron to refine the Modules; testing, rejecting and returning the few, faulty Modules Kontron did ship; and demanding performance under the Contract.

29. Not until December 2005 did Kontron finally begin to deliver Modules in any substantial quantity.

30. Even once Kontron began delivering greater numbers of Modules in or about December 2005, they still did not work properly.

31. For another four to five months, Exceptional Innovation repeatedly rejected Modules, devoted its resources to diagnosing their issues and failures, and persistently demanded delivery of conforming goods from Kontron. Kontron responded with additional excuses, and delays continued.

32. Finally, in or about April 2006, Kontron started to deliver working Modules, nearly a year after promised and after significant resources expended by Exceptional Innovation engineers to help Kontron solve the many technical difficulties with the Modules.

33. In June 2006, Mr. Huber of Kontron sent a letter to Exceptional Innovation admitting the Modules were faulty. As a result, each Module had to be individually repaired and reconfigured, causing further delay.

34. By the time Kontron delivered the quantity of Modules required by the Contract in or about November 2006, they had become outdated and were replaced by more advanced technology.

35. Exceptional Innovation requested to substitute the Modules for more advanced models in light of Kontron's lengthy delays and failures to provide the state-of-the art goods for which Exceptional Innovation contracted, but Kontron refused.

36. To date, Exceptional Innovation has paid in excess of $1 million to Kontron for the Modules and the other products that were part of the Contract.

37. Nonetheless, Kontron is now demanding in excess of $200,000 in additional payments from Exceptional Innovation.

38. As set forth herein, Exceptional Innovation has declined to pay any additional sums for the Modules.

39. Kontron materially breached the agreement by its lengthy and disruptive failures to deliver working, state-of-the-art Modules.

40. Exceptional Innovation has been damaged by Kontron's breaches. These damages include but are not limited to:

- Exceptional Innovation expended significant time and funds attempting to help Kontron cure defects in the Modules; and
- Kontron's failure to timely deliver the Modules contributed to delays in Exceptional Innovation's production schedule; and
- Exceptional Innovation is now left with a product that does not fulfill its original goal of building its new hardware devices with the most state-of-the-art technology possible.

COUNT I – Declaratory Judgment

41. Exceptional Innovation realleges and incorporates herein each and every allegation set forth above.

42. Kontron materially breached the Contract by engaging in the conduct as set forth above.

43. By virtue of Kontron's breaches, Exceptional Innovation is excused from further performance under the Contract, including payment of any additional sums.

44. Notwithstanding Kontron's material breaches of the Contract, which have in turn excused Exceptional Innovation's obligations to perform under the Contract, Kontron is demanding sums in excess of $200,000 from Exceptional Innovation.

45. Thus, there is a real and justiciable controversy between the parties as to whether the Exceptional Innovation has any further obligation to remit payment to Kontron in light of Kontron's material breaches of the Contract.

46. Under Ohio Rev. Code § 2721.03, Exceptional Innovation is entitled to a declaration construing the parties' rights and obligations under the Contract.

47. Speedy relief is necessary to preserve Exceptional Innovation's rights that may otherwise be impaired or lost.

48. Exceptional Innovation is entitled to a declaration that (1) Kontron materially breached the Contract and (2) that Exceptional Innovation is excused from further performance under the Contract as a result of said breach and thus has no liability to Kontron.

WHEREFORE, Exceptional Innovation, LLC hereby demands judgment and relief against Defendant Kontron America, Inc., as follows:

A. For a declaration that Kontron materially breached the Contract, and Exceptional Innovation is excused from any further performance or liability to Kontron under the Contract; and

B. For attorney fees and expenses; and

C. For costs and such other remedy as the Court deems just and proper.

Respectfully submitted,

Nelson M. Reid (0068434)
Sommer L. Sheely (0076071)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2300
Facsimile: (614) 227-
Email: nreid@bricker.com
ssheely@bricker.com
Attorneys for Plaintiff Exceptional Innovation, LLC

JURY DEMAND

Plaintiff Exceptional Innovation, LLC hereby demands a jury trial as to all issues so triable.

Nelson M. Reid (0068434)

IN THE COURT OF COMMON PLEAS DELAWARE COUNTY, OHIO

SUMMONS

Case Number: **07 CV H 06 0765**

Plaintiff(s):
EXCEPTIONAL INNOVATION LLC
480 OLDE WORTHINGTON ROAD
SUITE 350
WESTERVILLE, OH 43082

VS

Defendant(s):
KONTRON AMERICA INC
14118 STOWE DRIVE
POWAY, CA 92064

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned that a complaint (a copy of which is hereto attached and made a part hereof) has been filed against you in this court by the plaintiff(s) named herein.

You are required to serve upon the plaintiff(s) attorney, or upon the plaintiff(s) if he/she/they have/has no attorney of record, a copy of your answer to the complaint within twenty-eight (28) days after service of this summons upon you, exclusive of the day of service. Said answer must be filed with this court within three (3) days after service on plaintiff(s) attorney.

The name and address of the plaintiff(s) attorney is as follows:

NELSON M REID
100 SOUTH THIRD STREET
COLUMBUS OHIO 43215

If you fail to appear and defend, judgment by default will be taken against you for the relief demanded in the complaint.

Date: June 27, 2007
CERTIFIED MAIL: 1699

Jan Antonoplos
Delaware County Clerk of Courts

[signature]
Deputy Clerk

Exceptional Innovation

Purchase Request

Reference Number: JLH051305A

Priority: High

Date Requested: 5/12/2005

Date Required: 6/1/2005

Charge To: Exceptional Innovation

Submitted By

Name: Kyle Virgin

Department: Engineering

E-mail Address: kvirgin@exceptionalinnovation.com

Telephone Number: 614-901-8899 x50207

Address Line 1: 480 Olde Worthington Rd.

Address Line 2: Suite 350

City: Westerville

State/Province: Ohio

Postal Code: 43082

Country/Region: USA

Suggested Supplier Information

Company Name: Kontron

Web Site Address: www.kontron.com

Telephone Number: 800-523-2320

Fax Number: 858-677-0898

Shipping Information

☑ Allow Partial Shipment

☑ Ship to Address Listed Above

Ship Method: Two-day air

Itemized List

Currency: USD ($)

Summary: EI Controller

Item Number	Description / Part Number	Quantity	Unit Price ($)	Tax (%)	Pre-Tax Price ($)	Total with Tax ($)
1	ETX-PM 1.0GHz Celeron-M					
		1,000	503.00	0.000	503,000.00	503,000.00
2	IC 512MB DDR SDRAM SODIMM PC2					
		1,000	125.00	0.000	125,000.00	125,000.00
3	HSP-PM Threaded Stand Off					

		1,000	14.00	0.000	14,000.00	14,000.00

Subtotal ($)	642,000.00
Tax ($)	0.00
Shipping/Handling Cost ($)	0.00
Total ($)	642,000.00

Notes

Attn: Tony Hallett - 300 units requested ASAP. The rest to follow within next 12 months based upon demand. Reference Sales Quote#1011431SQ. Quote date 5/12/2005 Customer#193271

Signatures

Sign and print your name.

Kyle Virgin Kyle Virgin 5-12-2005

Employee Signature Date

Jeannie Heffner per Siale Moore 5-13-05

Approval Signature Date

Exceptional Innovation

Purchase Request

Reference Number: JLH0513058

Priority: High

Date Requested: 5/12/2005

Charge To: Exceptional Innovation

Date Required: 6/15/2005

Submitted By

Name: Kyle Virgin

Department: Engineering

E-mail Address: kvirgin@exceptionalinnovation.com

Telephone Number: 614-901-8899 x50207

Address Line 1: 480 Olde Worthington Rd.

Address Line 2: Suite 350

City: Westerville

State/Province: Ohio

Postal Code: 43082

Country/Region: USA

Suggested Supplier Information

Company Name: Kontron

Web Site Address: www.kontron.com

Telephone Number: 800-523-2320

Fax Number: 858-677-0898

Shipping Information

- [x] Allow Partial Shipment
- [x] Ship to Address Listed Above

Ship Method: Two-day air

Itemized List

Currency: USD ($)

Summary: EI WALLPANEL/SET-TOP-BOX

Item Number	Description / Part Number	Quantity	Unit Price ($)	Tax (%)	Pre-Tax Price ($)	Total with Tax ($)
1	ETXexpress-PM Module 760-2GHz					
		1,000	881.00	0.000	881,000.00	881,000.00
2	1024MB DDR2-DIMM					
		1,000	156.00	0.000	156,000.00	156,000.00
3	ETX-Express Heatspreader					

		1,000	16.00	0.000	16,000.00	16,000.00

Subtotal ($)	1,053,000.00
Tax ($)	0.00
Shipping/Handling Cost ($)	0.00
Total ($)	1,053,000.00

Notes

Attn: Tony Hallett - 300 units requested ASAP. The rest to follow within next 12 months based upon demand. Reference Sales Quote#1011422SQ. Quote date 5/12/2005 Customer#193271

Signatures

Sign and print your name.

Kyle Virgin Kyle Virgin — 5-12-2005

Employee Signature — Date

Jeannie Heffner per Seale-Moore — 5-13-05

Approval Signature — Date

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IN THE COURT OF COMMON PLEAS DELAWARE COUNTY, OHIO

SUMMONS

Case Number: **07 CV H 06 0765**

Plaintiff(s):		**Defendant(s):**
EXCEPTIONAL INNOVATION LLC 480 OLDE WORTHINGTON ROAD SUITE 350 WESTERVILLE, OH 43082	VS	KONTRON AMERICA INC 14118 STOWE DRIVE POWAY, CA 92064

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned that a complaint (a copy of which is hereto attached and made a part hereof) has been filed against you in this court by the plaintiff(s) named herein.

You are required to serve upon the plaintiff(s) attorney, or upon the plaintiff(s) if he/she/they have/has no attorney of record, a copy of your answer to the complaint within twenty-eight (28) days after service of this summons upon you, exclusive of the day of service. Said answer must be filed with this court within three (3) days after service on plaintiff(s) attorney.

The name and address of the plaintiff(s) attorney is as follows:

NELSON M REID
100 SOUTH THIRD STREET
COLUMBUS OHIO 43215

COPY

If you fail to appear and defend, judgment by default will be taken against you for the relief demanded in the complaint.

Date: June 27, 2007
CERTIFIED MAIL: 1699

Jan Antonoplos
Delaware County Clerk of Courts

Deputy Clerk

07 CV H 06
0765
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SUMC

IN THE COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO

EXCEPTIONAL INNOVATION, LLC
480 Olde Worthington Road, Suite 350
Westerville, Ohio 43082,

Plaintiff,

vs.

KONTRON AMERICA, INC.
14118 Stowe Drive
Poway, CA 92064

Defendant.

CASE NO. 07-CV-H-06-0765

JUDGE W. DUNCAN WHITNEY

JURY DEMAND ENDORSED HEREON

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED
2007 JUN 27 AM 9:4
JAN ANTONOPLOS
CLERK

COMPLAINT FOR DECLARATORY JUDGMENT

Now comes Plaintiff Exceptional Innovation, LLC ("Exceptional Innovation"), by and through counsel, and for its Complaint against Defendant Kontron America, Inc. ("Kontron") states the following:

The Parties

1. Exceptional Innovation is now and was at all relevant times an Ohio limited liability company with its principal place of business in Westerville, Delaware County, Ohio.

2. Upon information and belief, Kontron is now and was at all relevant times a Delaware corporation with its principal place of business in Poway, San Diego County, California. Upon information and belief, Kontron maintains and maintained at relevant times to this action a place or places of business in the State of Ohio. Kontron does business throughout the United States and worldwide.

Jurisdiction and Venue

3. The Court has personal jurisdiction over Kontron, among other reasons, under

07 CV H 06
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COMPLAINT

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Ohio's Long-Arm Statute, specifically, Ohio Revised Code §§ 2307.382(A)(1), (2), and (5).

4. Venue is proper in this Court pursuant to, *inter alia*, Civil Rule 3(B)(3), and (6) and Civil Rule 3(E) as Kontron conducted activity in Delaware County, Ohio, that gave rise to a claim for relief, and all or part of Exceptional Innovation's claim for relief arose in Delaware County, Ohio.

Statement of Facts

5. This case concerns a contract dispute between Exceptional Innovation, a final product manufacturer, and Kontron, one of its component vendors.

6. Exceptional Innovation is, in part, in the business of designing and selling state-of-the-art digital home entertainment and automation systems. These systems offer user convenience and efficiency by integrating various home entertainment systems onto a single network. In the course of its business, Exceptional Innovation designs and sells both software and hardware.

7. Kontron is in the business of selling embedded standard and custom computer technology. Kontron's products are components intended for integration into other systems. The relevant Kontron product to this action is a particular type of embedded internal computer module, which Exceptional Innovation expected to use in certain new hardware devices.

8. At a trade show in or about September 2004, Exceptional Innovation's President and Chief Executive Officer, Seale Moorer, was approached by Matthias Huber, Kontron's representative, who offered basic information about the nature of Kontron's products.

9. After the trade show, Mr. Moorer asked Kyle Virgin, Hardware Design Engineer for Exceptional Innovation, to explore further whether Kontron's technology may be an appropriate solution for integration into Exceptional Innovation's emerging hardware products.

10. As a result, Mr. Virgin made some information requests on Kontron's website.

11. Kontron's internal salesman, Tony Hallett, responded to these requests by telephoning Mr. Virgin. In their conversation, Mr. Hallett provided some additional background on Kontron's products.

12. Mr. Virgin informed Kontron, among other things, of the nature of the solution he was seeking, the nature of Exceptional Innovation's product lines, and Exceptional Innovation's anticipated production timetable for the new hardware devices.

13. Shortly thereafter, Kontron instructed its local agent, Jerome Rozek, to contact Exceptional Innovation to work toward developing an appropriate solution.

14. Upon information and belief, during the entire time Exceptional Innovation dealt with Mr. Rozek, he maintained an office as Kontron's employee and agent in North Royalton, Ohio, and listed both his office and mobile telephone numbers as within the 440 area code (suburban Cleveland). Mr. Rozek's email address was at all relevant times jerome.rozek@us.kontron.com.

15. In late 2004 and early 2005, Exceptional Innovation viewed and tested various sample products sent by Kontron both in Ohio and during visits to Kontron in California. Mr. Rozek also met with Exceptional Innovation in its Delaware County facility on four or five separate occasions.

16. A series of products Kontron offered in late 2004 and early 2005 was not acceptable for Exceptional Innovation's needs.

17. Finally, in April 2005, Kontron presented Exceptional Innovation with a module Exceptional Innovation felt would meet its needs, both in terms of technology and timeframe. This module is known by the Kontron name ETX Express (hereinafter "the Modules").

18. Among the features that were key to Exceptional Innovation's decision to order the Modules was their One Gigabit Ethernet product, which was far more advanced than other products on the market at the time. Exceptional Innovation communicated to Kontron that using state-of-the-art technology was critical to the hardware products it was developing.

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20. On or about May 12, 2005, Exceptional Innovation submitted two purchase requests to Kontron for approximately $1.5 million worth of several Kontron products, including approximately $912,000 worth of the Modules. (True and correct copies of the purchase requests are attached hereto as Exhibit A).

21. The purchase requests were accepted by Kontron, forming a binding contract for the goods ordered therein (the "Contract").

22. Consistent with Kontron's representations, the Contract indicated the "required date" for the Modules was June 15, 2005. The Contract also contains the following notation: "300 units requested ASAP. The rest to follow within the next 12 months based upon demand."

23. In fact, Kontron seriously misrepresented the date on which it could perform by delivering working Modules.

24. Beginning immediately after contracting, Kontron began to stall and to inform Exceptional Innovation of problems it was having in producing working Modules.

25. In the summer and fall of 2005, Kontron shipped only small quantities of Modules to Exceptional Innovation, which failed due to a variety of technical issues.

26. Exceptional Innovation promptly notified Kontron of these failures and returned the Modules to Kontron.

27. Exceptional Innovation also conducted extensive in-house testing on the Modules to aid Kontron in diagnosing problems with the Modules.

28. From the time of contracting until December – a period of six months – Mr. Virgin and others at Exceptional Innovation devoted substantial time on a daily basis to working with Kontron to refine the Modules; testing, rejecting and returning the few, faulty Modules Kontron did ship; and demanding performance under the Contract.

29. Not until December 2005 did Kontron finally begin to deliver Modules in any substantial quantity.

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32. Finally, in or about April 2006, Kontron started to deliver working Modules, nearly a year after promised and after significant resources expended by Exceptional Innovation engineers to help Kontron solve the many technical difficulties with the Modules.

33. In June 2006, Mr. Huber of Kontron sent a letter to Exceptional Innovation admitting the Modules were faulty. As a result, each Module had to be individually repaired and reconfigured, causing further delay.

34. By the time Kontron delivered the quantity of Modules required by the Contract in or about November 2006, they had become outdated and were replaced by more advanced technology.

35. Exceptional Innovation requested to substitute the Modules for more advanced models in light of Kontron's lengthy delays and failures to provide the state-of-the art goods for which Exceptional Innovation contracted, but Kontron refused.

36. To date, Exceptional Innovation has paid in excess of $1 million to Kontron for the Modules and the other products that were part of the Contract.

37. Nonetheless, Kontron is now demanding in excess of $200,000 in additional payments from Exceptional Innovation.

38. As set forth herein, Exceptional Innovation has declined to pay any additional sums for the Modules.

39. Kontron materially breached the agreement by its lengthy and disruptive failures to deliver working, state-of-the-art Modules.

40. Exceptional Innovation has been damaged by Kontron's breaches. These damages include but are not limited to:

- Exceptional Innovation expended significant time and funds attempting to help Kontron cure defects in the Modules; and
- Kontron's failure to timely deliver the Modules contributed to delays in Exceptional Innovation's production schedule; and
- Exceptional Innovation is now left with a product that does not fulfill its original goal of building its new hardware devices with the most state-of-the-art technology possible.

COUNT I – Declaratory Judgment

41. Exceptional Innovation realleges and incorporates herein each and every allegation set forth above.

42. Kontron materially breached the Contract by engaging in the conduct as set forth above.

43. By virtue of Kontron's breaches, Exceptional Innovation is excused from further performance under the Contract, including payment of any additional sums.

44. Notwithstanding Kontron's material breaches of the Contract, which have in turn excused Exceptional Innovation's obligations to perform under the Contract, Kontron is demanding sums in excess of $200,000 from Exceptional Innovation.

45. Thus, there is a real and justiciable controversy between the parties as to whether the Exceptional Innovation has any further obligation to remit payment to Kontron in light of Kontron's material breaches of the Contract.

46. Under Ohio Rev. Code § 2721.03, Exceptional Innovation is entitled to a declaration construing the parties' rights and obligations under the Contract.

47. Speedy relief is necessary to preserve Exceptional Innovation's rights that may otherwise be impaired or lost.

48. Exceptional Innovation is entitled to a declaration that (1) Kontron materially breached the Contract and (2) that Exceptional Innovation is excused from further performance under the Contract as a result of said breach and thus has no liability to Kontron.

WHEREFORE, Exceptional Innovation, LLC hereby demands judgment and relief against Defendant Kontron America, Inc., as follows:

A. For a declaration that Kontron materially breached the Contract, and Exceptional Innovation is excused from any further performance or liability to Kontron under the Contract; and

B. For attorney fees and expenses; and

C. For costs and such other remedy as the Court deems just and proper.

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Respectfully submitted,

Nelson M. Reid (0068434)
Sommer L. Sheely (0076071)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2300
Facsimile: (614) 227-
Email: nreid@bricker.com
ssheely@bricker.com
Attorneys for Plaintiff Exceptional Innovation, LLC

JURY DEMAND

Plaintiff Exceptional Innovation, LLC hereby demands a jury trial as to all issues so triable.

Nelson M. Reid (0068434)

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Exceptional Innovation

Purchase Request

Reference Number: JLH051305A

Priority: High

Date Requested: 5/12/2005

Charge To: Exceptional Innovation

Date Required: 6/1/2005

Submitted By

Name: Kyle Virgin

Department: Engineering

E-mail Address: kvirgin@exceptionalinnovation.com

Telephone Number: 614-901-8899 x50207

Address Line 1: 480 Olde Worthington Rd.

Address Line 2: Suite 350

City: Westerville

State/Province: Ohio

Postal Code: 43082

Country/Region: USA

Suggested Supplier Information

Company Name: Kontron

Web Site Address: www.kontron.com

Telephone Number: 800-523-2320

Fax Number: 858-677-0898

Shipping Information

☑ Allow Partial Shipment

☑ Ship to Address Listed Above

Ship Method: Two-day air

Itemized List

Currency: USD ($)

Summary:
EI ControlleR

Item Number	Description					Total with Tax ($)
	Part Number	Quantity	Unit Price ($)	Tax (%)	Pre-Tax Price ($)	
1	ETX-PM 1.0GHz Celeron-M					
		1,000	503.00	0.000	503,000.00	503,000.00
2	IC 512MB DDR SDRAM SODIMM PC2					
		1,000	125.00	0.000	125,000.00	125,000.00
3	HSP-PM Threaded Stand Off					

		1,000	14.00	0.000	14,000.00	14,000.00

Subtotal ($)	642,000.00
Tax ($)	0.00
Shipping/Handling Cost ($)	0.00
Total ($)	**642,000.00**

Notes

Attn: Tony Hallett - 300 units requested ASAP. The rest to follow within next 12 months based upon demand. Reference Sales Quote#1011431SQ. Quote date 5/12/2005 Customer#193271

Signatures

Sign and print your name.

Kyle Virgin Kyle Virgin 5-12-2005

Employee Signature **Date**

Jeannie Heffner per Slale Moorer 5-13-05

Approval Signature **Date**

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Exceptional Innovation

Purchase Request

Reference Number: JLH0513058

Priority: High

Date Requested: 5/12/2005

Charge To: Exceptional Innovation

Date Required: 6/15/2005

Submitted By

Name: Kyle Virgin

Department: Engineering

E-mail Address: kvirgin@exceptionalinnovation.com

Telephone Number: 614-901-8899 x50207

Address Line 1: 480 Olde Worthington Rd.

Address Line 2: Suite 350

City: Westerville

State/Province: Ohio

Postal Code: 43082

Country/Region: USA

Suggested Supplier Information

Company Name: Kontron

Web Site Address: www.kontron.com

Telephone Number: 800-523-2320

Fax Number: 858-677-0898

Shipping Information

☑ Allow Partial Shipment

☑ Ship to Address Listed Above

Ship Method: Two-day air

Itemized List

Currency: USD ($)

Summary: EI WALLPANEL/SET-TOP BOX

Item Number	Description					Total with Tax ($)
	Part Number	Quantity	Unit Price ($)	Tax (%)	Pre-Tax Price ($)	
1	ETXexpress-PM Module 760-2GHz					
		1,000	881.00	0.000	881,000.00	881,000.00
2	1024MB DDR2-DIMM					
		1,000	156.00	0.000	156,000.00	156,000.00
3	ETX-Express Heatspreader					

		1,000	16.00	0.000	16,000.00	16,000.00

Subtotal ($)	1,053,000.00
Tax ($)	0.00
Shipping/Handling Cost ($)	0.00
Total ($)	**1,053,000.00**

Notes

Attn: Tony Hallett - 300 units requested ASAP. The rest to follow within next 12 months based upon demand. Reference Sales Quote#1011422SQ. Quote date 5/12/2005 Customer#193271

Signatures

Sign and print your name.

Kyle Virgin Kyle Virgin — 5-12-2005

Employee Signature — **Date**

Jeannie Heffner per Seale-Moore — 5-13-05

Approval Signature — **Date**

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IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO
CLASSIFICATION FORM

CASE NO. 07-CV-H-06-0765 (W)

Judge W. Duncan Whitney

PLEASE INDICATE CLASSIFICATION INTO WHICH THIS CASE FALLS.

CIVIL

( ) Professional Tort------------------- A

( ) Product Liability -------------------- B

( ) Other Torts---------------------------- C

( ) Workers Compensation ----------- D

( ) Foreclosures ------------------------ E

( ) Administrative Appeal ------------- F

( ) Complex Litigation ---------------- G

(X) Other Civil------------------------ H

DOMESTIC RELATIONS

( ) Termination of Marriage, with children--- A

( ) Termination of Marriage, no children ------ B

( ) Dissolution of Marriage, with children----- C

( ) Dissolution of Marriage, no children ----- D

( ) Change of Custody ------------------------ E

( ) Visitation Enforcement / Modification---- F

( ) Support Enforcement / Modification------ G

( ) Domestic Violence ------------------------- H

( ) U.I.F.S.A.------------------------------------- I

( ) All Others------------------------------------ J

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED
2007 JUN 27 AM 9:46
JAN ANTONOPLOS
CLERK

PLEASE PRINT OR TYPE THE INFORMATION REQUESTED BELOW

DATE: June 27, 2007

TRIAL ATTORNEY: Nelson M. Reid

Ohio Supreme Court Registration Number: 0068434

Address: Bricker & Eckler, LLP
100 South Third Street
Columbus, Ohio 43215

Telephone: 614-227-2300

Fax Number: 614-227-2390

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0765
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MISC

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DELAWARE CLERK OF COURTS

Receipt Number **40273** Receipt Date **06/27/2007**

Case Number **07 CV H 06 0765**

Description **EXCEPTIONAL INNOVATION LLC vs. KONTRON AMERICA INC**

Received From **BRICKER & ECKLER**

Total Received	**138.00**
Net Received	**138.00**
Change	**0.00**

Receipt Payments	Amount	Reference	Description
CHECK	**138.00**	**212574**	

Receipt Applications	Amount
COST	**49.00**
DEPOSIT	**89.00**

Balance Due 36.00

Comments: **DEPOSIT ON NEW CASE**

Deputy Clerk: **dgolden** Transaction Date **06/27/2007 09:41:58**

ORIGINAL

JS44
(Rev. 07/89)

CIVIL COVER SHEET

FILED
NOV 15 2007
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [signature] DEPUTY

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS

Execeptional Innocation LLC

DEFENDANTS

Kontron America, Inc.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Ohio
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

ATTORNEYS (IF KNOWN)

'07 CV 2199 L (NLS)

Philomena Dane
1300 Huntington Center
Columbus, Ohio 43215

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT
(For Diversity Cases Only)

	PT	DEF		PT	DEF
Citizen of This State	☐1	☐1	Incorporated or Principal Place of Business in This State	☐4	☐4
Citizen of Another State	☐2	☐2	Incorporated and Principal Place of Business in Another State	☐5	☐5
Citizen or Subject of a Foreign Country	☐3	☐3	Foreign Nation	☐6	☐6

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 USC 1441

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment &Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153Recovery of Overpayment of Veterans Benefits
- ☐ 160 Stockholders Suits
- ☒ 190 Other Contract
- ☐ 195 Contract Product Liability

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Eiectmant
- ☐ 240 Tort to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury- Medical Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/Accommodations
- ☐ 444 Welfare
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence Habeas Corpus
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prisoner Conditions

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC881
- ☐ 630 Liquor Laws
- ☐ 640 RR & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt. Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (13958)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS - Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reappointment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities Exchange
- ☐ 875 Customer Challenge 12 USC
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State
- ☐ 890 Other Statutory Actions

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

SOUTHERN DISTRICT OF OHIO

☐ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appelate Court ☐ 4 Reinstated or Reopened ☒ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23 **DEMAND $** Check YES only if demanded in complaint: **JURY DEMAND:** ☒ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE Docket Number

DATE 11/15/07

SIGNATURE OF ATTORNEY OF RECORD

PPV